No. 9726

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SUN CHONG LEE alias Colonel Lee,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF JURISDICTION.

This is an appeal in a criminal case. The indictment against appellant was filed in the United States District Court for the Territory of Hawaii. (R. 2-5.) It charged him with violating the White Slave Traffic Act in said territory. (28 U.S.C.A., sec. 405.) Jurisdiction of the said district court is therefore sustained by the Organic Act of Hawaii (48 U.S.C.A., secs. 641-645) and by the said White Slave Traffic Act (18 U.S.C.A., sec. 401). The final decision of the said district court was entered on September 14, 1940. (R. 10-11.) Application for appeal was filed and allowed on November 19, 1940. (R. 12-13.) The appeal was therefore timely. (18 U.S.C.A., sec. 230.) Jurisdiction of this court to

review the said final decision is sustained by section 128 of the Judicial Code, amended. (28 U.S.C.A., sec. 225 (a) (d).)

STATEMENT OF THE CASE.

By the indictment (R. 2-5) appellant was charged with two violations of the White Slave Traffic Act. (18 U.S.C.A., secs. 397-404.) The first count in the indictment was based on section 3 of the said act (18 U.S.C.A., sec. 399). (R. 2.) It alleged that appellant and others induced one Nancy O'Connor to go from Honolulu, City and County of Honolulu, Territory of Hawaii, to Wailuku, Island and County of Maui, Territory of Hawaii, for immoral purposes, and caused her to be transported from Honolulu to Wailuku "as a passenger upon the Inter-Island Airways, Ltd.,". (R. 3-4.)

The second count in the indictment was based on section 2 of the White Slave Traffic Act (18 U.S.C.A., sec. 398). (R. 2.) It alleged that appellant and others caused the said Nancy O'Connor to be transported from Honolulu, City and County of Honolulu, Territory of Hawaii, to Kihei, Island and County of Maui, Territory of Hawaii, for immoral purposes. (R. 4-5.)

Before entering his plea the appellant, jointly with a codefendant, filed a demurrer to the indictment. (R. 5-7.) Respecting the first count the demurrer specified generally "That Count one of said indictment is not sufficient in law to compel them or either of them to answer thereto", and specifically "That it does not

appear in said count the manner or means used and employed in connection with the transportation of the said Nancy O'Connor from Honolulu to Wailuku or whether said transportation occurred over the route of a common carrier or otherwise". (R. 6.) Respecting both the first and second count the demurrer specified "That Title 18, Section 403, U.S.Code, excludes the Territory of Hawaii from the provisions of Sections 399 and 398, Title 18, U.S.Code, in their intraterritorial application". (R. 7.)

The demurrer was overruled. (R. 8.) At the trial, the jury found appellant guilty on both said counts. (R. 8.) The final judgment entered upon the conviction on September 14, 1940, sentenced appellant as follows (R. 10-11):

> "Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby sentenced as to Count I of said Indictment to pay a fine of Five Hundred Dollars ($500.00) and to serve Three (3) Months in the City and County Jail at Honolulu, T.H. As to Count II of the Indictment, the imposition of sentence is suspended and the defendant is placed on probation under Rule 131 of this Court, for the period of Three (3) Years, said probationary sentence to begin upon the Defendant's release from jail. Costs are hereby remitted."

Application for appeal was made and allowed on November 19, 1940. (R. 12-13.) In accordance with Rule 2 (a) of this court respecting criminal appeals assignment of errors was filed with the clerk of the trial court. (R. 14-15.) And in accordance with Rule

19, subd. 6, of this court, appellant filed in this court a statement of the points on which he intended to rely on the appeal and a designation of the parts of the record which he thought necessary for the consideration thereof. (R. 17.)

The questions involved on the appeal are these: *First,* Does the first count of the indictment charge a crime under section 3 of the White Slave Traffic Act (18 U.S.C.A., sec. 399) in the absence of allegation that transportation was upon the line or route of a common carrier? *Second,* Does section 7 of the White Slave Traffic Act (18 U.S.C.A., sec. 403) make the act inapplicable to the Territory of Hawaii and render the indictment insufficient to charge any crime?

These questions were raised by the demurrer to the indictment. (R. 5-7.) The trial court answered both questions adversely to appellant. (R. 8.) Both questions were preserved by the assignment of errors. (R. 14-15.)

SPECIFICATION BY NUMBER OF ASSIGNED ERRORS RELIED UPON.

I

That the Court erred in overruling the demurrer interposed herein by said defendant, Sun Chong Lee alias Colonel Lee. (R. 14.)

II

That the Court erred in holding and finding (by overruling the demurrer interposed herein) that the

charge contained in Count One of the indictment herein, predicated on Section 399, Title 18, U.S.Code, sufficiently charged a criminal offense under said section notwithstanding it was nowhere alleged in said indictment that the transportation complained of therein occurred over the route of a common carrier. (R. 14.)

III

That the Court erred in overruling the demurrer with respect to Count One of said indictment by reason of the fact that said count failed to allege that the transportation complained of in said indictment occurred over the route of a common carrier. (R. 14.)

IV

That the Court erred in overruling the demurrer herein by reason of the fact that Section 403, Title 18, U.S.Code excludes the Territory of Hawaii from the provisions of Sections 398 and 399, Title 18, U.S.Code, with respect to intra-territorial transportation. (R. 15.)

ARGUMENT OF THE CASE.

A. SUMMARY.

The first count in the indictment was based on section 3 of the White Slave Traffic Act. (18 U.S.C.A., sec. 399.) An essential element of the crime denounced by said section 3 is that transportation must be upon the line or route of a common carrier. The first count in the indictment failed to allege this essential element.

Therefore the first count in the indictment is insufficient to allege a violation of said section 3 or sustain a conviction thereunder.

The term "Territory" as used in the White Slave Traffic Act is defined by section 7 of the said act. (18 U.S.C.A., sec. 403.) The definition thus given necessarily excludes the Territory of Hawaii. Both counts in the indictment allege intra-territorial transportation within the Territory of Hawaii. Therefore, neither count in the indictment is sufficient to charge a violation of the said act or sustain a conviction thereunder.

B. POINTS OF FACT AND LAW.

1. **THAT THE COURT ERRED IN HOLDING AND FINDING (BY OVERRULING THE DEMURRER INTERPOSED HEREIN) THAT THE CHARGE CONTAINED IN COUNT ONE OF THE INDICTMENT HEREIN, PREDICATED ON SECTION 399, TITLE 18, U.S. CODE, SUFFICIENTLY CHARGED A CRIMINAL OFFENSE UNDER SAID SECTION NOTWITHSTANDING IT WAS NOWHERE ALLEGED IN SAID INDICTMENT THAT THE TRANSPORTATION COMPLAINED OF THEREIN OCCURRED OVER THE ROUTE OF A COMMON CARRIER. (Assignment of Error No. II, R. 14.)**

As originally enacted, the White Slave Traffic Act contained eight sections consecutively numbered 1 to 8. (Act of June 25, 1910, c. 395, 36 Stat. 825.) The act now appears as 18 U.S.C.A., secs. 397-404.

The first count in the indictment was based on section 3 of the said act. (18 U.S.C.A. 399.) The section reads:

> "Any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any

> woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, *and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers* in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than $5,000, or by imprisonment for a term not exceeding five years or by both such fine and imprisonment, in the discretion of the court." (Emphasis added.)

It is plain from a reading of the emphasized part of the above quoted section that transportation upon the line or route of a common carrier is an essential element of the crime denounced by the section. And the cases leave no doubt on the subject.

Sloan v. United States, C.C.A.Mo. 1923, 287 F. 91;

Alpert v. United States, C.C.A.N.Y.1926, 12 F. 2d 352;

Blain v. United States, C.C.A.Iowa, 1927, 22 F. 2d 393;

Coltabellotta v. United States, C.C.A.N.Y.1930, 45 F. 2d 117;

United States v. Saledonis, C.C.A.Conn.1938, 93 F. 2d 302.

In *Blain v. United States,* 22 F. 2d 393, it was said, at page 395:

> "It is contended by defendant that the mode of travel should have been set out. This is not necessary under Section 2 of the Act (*Wilson v. United States,* 232 U.S. 563, 34 S.Ct. 347, 58 L.Ed. 728); and the fact that a common carrier was not mentioned shows that the indictment was drawn under Section 2, and not under Section 3 or Section 4 (18 U.S.C.A., secs. 398-400). Under the two last sections transportation by common carrier is an ingredient of the offense."

And in *United States v. Saledonis,* 93 F. 2d 302, it was said, at page 302:

> "Transportation referred to in section 2 (18 U.S.C.A., sec. 398) may be either by public or private carrier as long as it involves crossing state lines. But section 3 (18 U.S.C.A., sec. 399) makes the offense the offering of an inducement by one who shall 'thereby knowingly cause' such woman to go on a common carrier in interstate commerce. Thus there are two distinct crimes set forth in the statute."

The first count in the indictment based on said section 3 (R. 2) failed to allege the essential element of transportation by common carrier. It alleged:

> "and that the said defendant then and there and in furtherance of such purpose jointly, knowingly, wilfully, unlawfully and feloniously did transport and cause to be transported the said Nancy O'Connor from Honolulu aforesaid to Wailuku, Island and County of Maui, Territory of Hawaii, as a passenger upon the Inter-Island Airways, Ltd., . . ." (R. 3-4.)

The first count in the indictment was devoid of allegation that the Inter-Island Airways, Ltd. was a common carrier. In *Alpert v. United States,* 12 F. 2d 352, it was held that an indictment charging transportation by means of automobile was insufficient to charge transportation by a common carrier; and in *Coltabellotta v. United States,* 45 F. 2d 117, it was held that evidence that transportation was by "bus which took passengers who had tickets" was insufficient to establish that transportation was by common carrier. Manifestly, the first count in the indictment was therefore insufficient to allege a violation of said section 3 or sustain the conviction thereunder.

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2. **THAT THE COURT ERRED IN OVERRULING THE DEMURRER WITH RESPECT TO COUNT ONE OF SAID INDICTMENT BY REASON OF THE FACT THAT SAID COUNT FAILED TO ALLEGE THAT THE TRANSPORTATION COMPLAINED OF IN SAID INDICTMENT OCCURRED OVER THE ROUTE OF A COMMON CARRIER. (Assignment of Error No. III, R. 14.)**

In addition to a general specification respecting the insufficiency of count one (R. 6) the demurrer particularized the insufficiency and pointed out that count one did not allege that transportation was over the route of a common carrier (R. 6). This particularization of insufficiency was preserved by Assignment of Error No. III. The argument regarding the assignment is necessarily the same as that just made regarding Assignment of Error No. II.

3. THAT THE COURT ERRED IN OVERRULING THE DEMURRER HEREIN BY REASON OF THE FACT THAT SECTION 403, TITLE 18, U.S.CODE EXCLUDES THE TERRITORY OF HAWAII FROM THE PROVISIONS OF SECTIONS 398 AND 399, TITLE 18, U.S. CODE, WITH RESPECT TO INTRA-TERRITORIAL TRANSPORTATION. (Assignment of Error No. IV, R. 15.)

The term "Territory" as used in the White Slave Traffic Act is defined by section 7 of the said act. (18 U.S.C.A., sec. 403.) It reads, in pertinent part:

> "The term 'Territory,' as used in sections 397 to 404 of this title, shall include the District* of Alaska, the insular possessions of the United States, and the Canal Zone. . . .
>
> *'District' should be 'Territory.' " (18 U.S.C.A., sec. 403.)

The definition thus given necessarily excludes the Territory of Hawaii, for it certainly cannot be classed as among "the insular possessions of the United States". As pointed out, both counts in the indictment alleged intra-territorial transportation within the Territory of Hawaii. As the Territory of Hawaii is excluded by the definition contained in said section 7 it therefore follows that neither count in the indictment is sufficient to charge a violation of the said act or sustain a conviction thereunder.

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4. THAT THE COURT ERRED IN OVERRULING THE DEMURRER INTERPOSED HEREIN BY SAID DEFENDANT, SUN CHONG LEE ALIAS COLONEL LEE. (Assignment of Error No. I, R. 14.)

All arguments heretofore made might have been presented under this general assignment of error. It was believed, however, that clarity would be served by

presenting the arguments under assignments of error which fully disclosed the points to be urged on the appeal.

CONCLUSION.

For the several reasons herein appearing, it is therefore respectfully submitted that the judgment should be reversed as to each count.

Dated, San Francisco, California,
April 30, 1941.

E. J. Botts,
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